No. 09-1577

In The
Supreme Court of the United States

MARK BAKER,

Petitioner,

v.

BOOZ ALLEN HAMILTON, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Respondent Booz Allen Hamilton, Inc. ("Booz Allen") disagrees with the presentation of the Questions Presented for Review submitted by Petitioner Mark G. Baker ("Baker"). The two questions presented for review, expressed concisely in relation to the circumstances of the case, are:

Did the United States Court of Appeals for the Fourth Circuit (the "Circuit Court") correctly apply Maryland state law to determine whether Booz Allen was liable for its employee's alleged conduct in Kyrgyzstan when Baker invited the application of Maryland law and declined to furnish proof of Kyrgyz law pursuant to FED. R. CIV. P. 44.1?

Did the Circuit Court correctly conclude that, under Maryland negligence law, Booz Allen did not negligently hire, supervise, or retain an employee working in Kyrgyzstan based upon the undisputed material facts contained in the record of the case?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The only parties to the proceeding in the Circuit Court were Plaintiff-Petitioner Baker and Defendant-Respondent Booz Allen.

Booz Allen Hamilton, Inc. is wholly owned by Explorer Investor Corporation, which itself is wholly owned by Explorer Holding Corporation. There are no parents, trusts, subsidiaries and/or affiliates of said party that have issued shares or debt securities to the public.

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OPINION AND ORDER BELOW

This is an Opposition to a Petition for a Writ of Certiorari arising from a decision by the United States Circuit Court For The Fourth Circuit affirming the decision of the United States District Court of the District of Maryland (the "District Court") to grant Booz Allen's motion for summary judgment. The Circuit Court's unpublished opinion is available at *Baker v. Booz Allen Hamilton, Inc.*, 358 Fed. Appx. 476 (4th Cir. Dec. 28, 2009). That opinion is included in Baker's Appendix at A1-A16.

The District Court's order granting Booz Allen's motion for summary judgment is unreported and unpublished. The District Court order is included in Baker's Appendix at A17-A18. The District Court Judge's verbatim recitation of his ruling on Booz Allen's summary judgment motion is set forth in the Booz Allen Appendix at 3a-21a.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The Circuit Court did not rely on any federal constitutional, statutory, or regulatory law to determine that Baker did not establish his Maryland negligence claim. The Circuit Court relied solely on Maryland common law to analyze Baker's claim. *See* A-10. (stating that "[w]e need not decide whether the district court erred in examining Baker's claims under Kyrgyz law. This is so because, even accepting Baker's invitation to apply Maryland law, Baker's negligence claims fail."). As such, there are no constitutional provisions, treaties, statutes, ordinances, or regulations involved in this case.

COUNTERSTATEMENT OF THE CASE

I. Introduction.

In this case, Baker asks that this Court review the Circuit Court of Appeals' application of well-settled (and unchallenged) Maryland law in a negligence case. Baker presents no federal issues for this Court's review. Instead, Baker requests that this Court review two issues of Maryland law.

First, Baker claims that the Circuit Court misapplied Maryland *lex loci delicti* law when it employed Maryland substantive law to determine whether Baker's negligence claims could survive summary judgment. Notably, *Baker argued for the application of Maryland law* in the District Court and the Circuit Court.[1] In an abundance of caution, the District Court applied Kyrgyz law, Maryland law, and Virginia law, and concluded that Baker failed to establish a claim against Booz Allen under the substantive law of all three jurisdictions. *See* Appendix to Brief in Opposition ("App.") at 15a. On appeal, the Circuit Court "accept[ed] Baker's invitation to apply Maryland law" for the sake of argument, and, like the District Court, concluded that Baker's claims were properly dismissed on a motion for summary judgment. *See Baker v. Booz Allen Hamilton, Inc.*, 358 Fed. Appx. 476, 482 (4th Cir. 2009).

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[1] Pursuant to Federal Rule of Civil Procedure 44.1, Booz Allen argued for the application of Kyrgyz law in both the District Court and Circuit Court, while also analyzing Baker's claims under both Maryland and Virginia state law as well.

Baker now requests that this Court review his case to determine whether the Circuit Court – at Baker's insistence – wrongfully applied Maryland substantive law to its determination of his negligence claims. In doing so, Baker reverses his previously stated position that Maryland law should apply and now suggests the application of Kyrgyz law. Baker's argument fails to account for the fact that he sought to have Maryland law apply and that he did not comply with Federal Rule of Civil Procedure 44.1 in seeking the application of foreign law before the District Court.

Second, Baker claims that the Circuit Court misapplied well-settled Maryland substantive law when it concluded that based on the undisputed material facts, "the injury in this case (sexual assault) simply was not reasonably foreseeable injury arising from the alleged negligent hiring, retention and/or supervision of [Brian] Davenport." A-13. Baker does not argue that the Circuit Court applied incorrect legal principles under Maryland law. Instead, Baker disagrees with the District and Circuit Courts' conclusions that Booz Allen cannot be held liable for Baker's alleged injuries because its employment, supervision, and retention of one of its employees cannot be the legal cause of Baker's alleged injuries in light of the undisputed material facts presented in the Record.

II. Counterstatement of Facts.

Booz Allen is a leading management consulting firm. JA 56-57.[2] In 1995, Booz Allen commenced work for the United States Agency for International Development ("USAID") on its project for the Development and Implementation of an effective Bankruptcy System and Law in Kazakhstan and the Kyrgyz Republic ("Bankruptcy Project"). JA 57.

On or about October 1, 1995, Booz Allen entered into a contract with Kathleen J. Woody ("Woody") to provide consulting services as an independent contractor serving as "Chief of Party" to the Bankruptcy Project. JA 66-68; see also JA 32, ¶ 3. *Woody is both Baker's counsel of record and his mother.*

As an independent contractor, Woody's primary work location was in Kazakhstan, but she also had oversight of operations in and traveled to Kyrgyzstan for the Bankruptcy Project. JA 70-74. As Chief of Party, Woody was responsible for fulfillment of the scope of work and deliverables under the Bankruptcy Project task order (i.e., supporting the development of legislation to allow bankruptcy laws to function in private enterprise markets) and supervising expatriate staff. JA 32, 56. Booz Allen terminated Woody's independent consulting contract effective June 7, 1996 – prior to the end of the intended duration of her assignment. JA 76.

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[2] Reference to JA constitutes a citation to the Joint Appendix in the Circuit Court proceeding.

Baker alleges that, while Woody was performing her duties in Kazakhstan, an employee of Booz Allen sexually assaulted him in March 1996 in that employee's personal residence. Baker never made a complaint to the Kyrgyz police or judicial system regarding the alleged assault. JA 32, ¶ 4. Baker first "remembered" the assault during a hypnotherapy session with a practitioner in London, England, sometime during the winter of 1997 – almost a year after the assault allegedly occurred. JA 204:21-207:10. Prior to his recollection during the 1997 hypnotherapy session, Baker "lied" to his mother about the alleged assault by Davenport on 16 separate occasions. JA 162:19-163:4. In fact, Baker repeatedly admitted throughout his deposition that he had lied about rape allegations in the past – complaining that he had been raped or sexually assaulted when in actuality he had not been raped or sexually assaulted. JA 167:19-168:8 (false allegation of rape at Doctor's Community Hospital); JA 173:16-175:6 (false allegation of rape at the South Coast Medical Center); JA 180:20-182:8 (false allegation of rape at Huntington Beach Hospital); JA 169:1-13 (false complaint of "inappropriate fondling").

The alleged perpetrator is Dr. Brian A. Davenport ("Davenport"). Davenport has been continuously employed by Booz Allen since April 14, 1994. JA 58-59. From November 1995 through June 1996, Davenport was a Senior Consultant on several international and domestic projects, including the Bankruptcy Project. His job duties on the Bankruptcy Project were to "deal with the non-legal, non-lawyer required aspects of performance and scope work under the task order" primarily in

Bishkek, Kyrgyzstan. JA 81. Davenport reported to Woody for "scope of work issues related to the task order itself" but generally reported to the Task Manager on the Bankruptcy Project who was a Virginia-based Booz Allen employee. JA 81, 108.

Baker maintains that Booz Allen knew or should have know that Davenport had "serious emotional disorders." JA 32, ¶ 4. To the contrary, however, Booz Allen had never sanctioned, demoted or disciplined Davenport at any time prior to the alleged sexual assault. JA 78. While Baker represents that four people asked his mother to persuade a USAID official "to accept Davenport as a Booz Allen representative in Kazakhstan and Kyrgyzstan, despite [the official's] objections that Brian [Davenport] was unsuitable for the job based on his prior behavioral problems[,]" App. Br. 4 (generally citing JA 242), the Record is devoid of what "prior behavioral problems" made Davenport "unsuitable for the job."

III. Counterstatement of Procedural Background.

On January 9, 2006, Baker filed a complaint in Maryland state court seeking damages against Booz Allen for negligence. Baker did not name Davenport as a defendant, or otherwise identify him as the perpetrator in his pleadings. Baker has never alleged any cause of action arising under federal law.

Booz Allen timely removed the case to the District Court on April 6, 2006. The District Court possessed subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) based on the diversity of the parties' citizenship.

On December 19, 2007, the Honorable Rodger W. Titus granted Booz Allen's motion for summary judgment. Judge Titus delivered a detailed oral opinion filling twenty-two transcript pages. *See* App. at 3a-21a. The District Court first applied the principal of *lex loci delecti* under Maryland's choice of law rules and concluded that he should first look to the laws of Kyrgyzstan as the undisputed location of the alleged injury. *See id.* at 12a-14a. The District Court correctly concluded that Booz Allen provided adequate notice of the application of foreign law and sufficiently offered a sworn declaration from a member of the Kyrgyz bar to articulate the applicable substantive law. *See id.* at 13a. Based upon the sworn declaration, the District Court properly concluded that "the law of Kyrgyzstan would not permit liability to be imposed upon Booz Allen under the circumstances of this case." The District Court did not, however, rest its decision solely on Kyrgyz law, taking special care to explain that the ruling considered all three laws that could possibly apply to Baker's negligence claims. *See id.* at 15a-21a.

Applying Maryland law, the District Court correctly concluded that: (1) Maryland recognizes claims of negligent hiring and negligent retention; (2) foreseeability of harm is a required element of Baker's claims; (3) the Record was devoid of any

information that "would indicate that the defendant was aware of a severe or documented emotional disorder of [the alleged perpetrator;]" (4) the Record lacks any information "that would support a conclusion that Booz Allen was on notice that [Davenport] had a proclivity or a high risk of committing sexual attacks of any nature, much less violent attacks;" and (5) Baker failed to place any material facts in the Record to establish foreseeability on the part of BAH. *See id.*[3]

On January 2, 2008, Baker filed a notice of appeal. JA 550. The Circuit Court had appellate jurisdiction over this lawsuit pursuant to 28 U.S.C. §§ 1291 and 1294(1). On December 28, 2009, the Circuit Court affirmed the District Court's decision that Baker failed to establish his claims under Maryland law. *See Baker*, 358 Fed. Appx. at 484. In so doing, the Circuit Court addressed the two issues presented in the Petition for Writ of Certiorari ("Petition").

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[3] The District Court proceeded to rule that if his first conclusion regarding the application of Kyrgyz law was incorrect, and if his secondary assessment of Maryland law was misplaced, Baker would "fare even worse" under Virginia law. The Circuit Court did not address the application of Virginia law and neither does Baker in his Petition to this Court.

First, the Circuit Court decided to apply Maryland substantive law to analyze Baker's claims based solely on Baker's argument that Maryland law should apply. Specifically, the Circuit Court stated:

> In its decision granting [Booz Allen's] motion for summary judgment, the district court, out of an abundance of caution, held that Baker could not prevail under Kyrgyz (the locus of Baker's injuries), Maryland (the forum state), or Virginia (where decisions concerning Davenport's employment were made) law. Baker claims that Maryland law should apply because [Booz Allen] failed to meet its burden of proving Kyrgyz law and, therefore, Maryland law, as the forum state's law, applies. In particular, he claims that the statutes referenced in [Booz Allen's Rule 44.1 proof of foreign law] are not controlling and, in any event, do not fully explain the breadth of Kyrgyz law.
>
> We need not decide whether the district court erred in examining Baker's claims under Kyrgyz law. This is so because, even accepting Baker's invitation to apply Maryland law, Baker's negligence claims fail.

Baker, 358 Fed. Appx. at 482. The Circuit Court clearly did not analyze or otherwise hold that Kyrgyz law did not apply. Rather, it simply applied the law that Baker sought to have applied.

Second, the Circuit Court applied Maryland negligence law and rejected Baker's claims. Specifically, the Circuit Court, relying principally on *Pittway Corp. v. Collins*, 973 A.2d 771 (2009), concluded that Booz Allen's employment, supervision, and retention could not be the proximate cause of Baker's alleged injuries:

> Legal causation is the policy-oriented doctrine designed to be a method for limiting liability. . . The question of legal causation most often involves a determination of whether the injuries were a foreseeable result of the defendant's negligent conduct. . . .
>
> *****
>
> In our view, the injury in this case (sexual assault) simply was not a reasonably foreseeable injury arising from the alleged negligent hiring, retention, and/or supervision of Davenport.

Baker, 358 Fed. Appx. at 483.

Simply stated, the Circuit Court, agreeing with the District Court, applied Maryland proximate causation law and determined that Booz Allen cannot be held liable for Baker's injuries.

IV. Summary of Baker's Argument on Petition for Writ of Certiorari.

Baker now seeks this Court's review of the Circuit Court's decision. In his Petition, seemingly advances three arguments.

First, Baker argues that the Circuit Court incorrectly concluded that Baker's claim fails under Maryland law. See Pet. at 12-18. This argument is three-fold. Baker first claims that the Franken Amendment of the Department of Defense Appropriations Act, Pub. L. No. 111-118 (2009), contravenes the Circuit Court's decision because it simply "shows Federal policy that employer negligent retention, supervision and hiring liability for employee sexual assault in harsh foreign workplaces is a sufficiently common problem that it must be provided for in U.S. legislation." Pet. at 14. Baker does not, however, explain how the Franken Amendment alters the Circuit Court's analysis of Baker's claims under Maryland law.

Baker then argues that the Circuit Court misapplied the rules of law contained in *Pittway Corp.* because that is a "smoke detector case." Pet. at 14-15. Baker does not explain why *Pittway Corp.'s* legal principles are flawed or otherwise inapplicable. Instead, Baker attempts to distinguish *Pittway Corp.* on the grounds that *Pittway Corp.* was not a case involving sexual assault. Baker seems to argue that the scope of what constitutes legal cause should expand depending on the severity of the alleged injuries. Baker does not cite any legal authority for his argument that the Circuit Court

misapplied *Pittway Corp.*, or his theory that the gravity of the injuries allegedly suffered should somehow expand the number of third-parties responsible for the illicit conduct.

Finally, Baker complains that the Circuit Court's decision was unfair for equitable reasons. Pet. at 15-18. Baker argues that federal contractors should "not get a free pass when compromised personnel ... severely injure[s] someone the Federal Contractor knows could be in his path." Pet. at 15. He claims that the expatriate community in Bishkek was akin to a prison from which he could not escape, and blames Booz Allen (and not his mother, who voluntarily moved with Baker to Bishkek to pursue her professional goals) for the alleged injuries. Pet. at 16-17. He complains that the Circuit Court decision "shields" federal contractors from liability even though their security teams are apparently best-equipped to discover dangerous employees. Pet. at 17-18. Baker does not provide any legal authority to support his equitable arguments, nor does he explain how the Circuit Court's decision under Maryland law was incorrect.

Second, Baker maintains that the Circuit Court decision conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009). Pet. at 18-21. Baker interprets *Jones* to stand for the proposition that "sexual assault [is] sufficiently foreseeable and unextraordinary [sic] to support the victim['s] . . . right to sue a company for negligent retention and supervision [of] its employee is greater than the Federal proclivity for favoring

arbitration over litigation." Pet. at 18. Baker does not explain how (or even claim that) he was deprived of his right to sue Booz Allen in a court of law, or how the arbitrability of the tort claims at issue in *Jones* is relevant to the Circuit Court's decision.

Third, and contrary to his position throughout this lawsuit, Baker now contends that the Circuit Court should have applied Kyrgyz law, but not the law that Booz Allen submitted pursuant to FED. R. CIV. P. 44.1. Pet. at 21-25. Baker contends that he could establish his claims if the Circuit Court applied his version of Kyrgyz law. Baker justifies his late production on the grounds that the applicable 1964 Civil Code of Kyrgyz Soviet Socialist Republic was "hard to obtain." Pet. at 22. He does not explain why it was not equally as difficult for Booz Allen to obtain or why he could not obtain it during the almost two years between when he filed suit and the granting of summary judgment.

REASONS FOR DENYING THE PETITION

This Court should deny Baker's Petition because the Circuit Court correctly determined that Baker failed to establish any claim against Booz Allen, and because Baker presents no federal issue for this Court to review on appeal.

I. Baker Failed to Establish His Negligence Claims Under Maryland Law.

The essential elements of a negligence claim under Maryland law are that: (1) the defendant had a duty to protect the plaintiff from injury, (2) the defendant breached that duty, (3) the plaintiff suffered actual injury or loss, and (4) the defendant's breach of duty proximately caused the loss or injury. *See Rhaney v. Univ. of Md. E. Shore*, 880 A.2d 357, 363-364 (Md. 2005). Negligence cannot exist where no duty is due and the existence of such a legal duty is a question of law to be decided by the court. *See id.*; *Doe v. Pharmacia & Upjohn Co., Inc.*, 879 A.2d 1088, 1091 (Md. 2005). Only after establishing that a duty exists must a court consider what that duty is and whether sufficient evidence exists to prove that a defendant, by action or inaction, breached that duty. *Rhaney*, 880 A.2d at 364.

The duty of an employer, the Maryland Court of Appeals explained in *Evans v. Morsell*, 395 A.2d 480, 483 (Md. Ct. App. 1978) (internal citations omitted), is "to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an

unfit employee." However, "[t]he concept that all persons owe a duty to all other persons to use reasonable care to protect them from harm must be limited if we are to avoid liability for unreasonably remote consequences." *Henley v. Prince George's County*, 503 A.2d 1333, 1340 (Md. 1986) (also finding that the causation element of a negligence claim requires proof of an appropriate nexus between the assignment of the employee's duties and the injury).

As a threshold statement, the assault Davenport is alleged to have committed is, as a matter of law, not within the scope of his employment with Booz Allen and, thus, the doctrine of *respondeat superior* is not applicable to the Court's inquiry. *See Wolfe v. Anne Arundel County*, 821 A.2d 52, 62 (Md. 2003) (finding that a law enforcement officer who commits rape is not acting within the scope of his employment). Moreover, there is no general duty to control the conduct of a third person so as to prevent him or her from causing physical harm by criminal acts or intentional torts, absent a special relationship. *See Horridge v. St. Mary's County Dept. of Soc. Servs.*, 854 A.2d 1232, 1239 (Md. 2004). In the present case, Baker neither alleged nor proved any special relationship between himself and Booz Allen.

Assuming *arguendo* that the *respondeat superior* doctrine applied and further assuming the existence of a special relationship between Baker and Booz Allen, the undisputed material facts do not permit a reasonable fact-finder to conclude that the alleged actions of Dr. Davenport were in any way reasonably foreseeable. *See Henley*, 503 A.2d at

1340 (stating that "[t]he concept that all persons owe a duty to all other persons to use reasonable care to protect them from harm must be limited if we are to avoid liability for unreasonably remote consequences."); *see also Rhaney*, 880 A.2d at 368 (finding that a student's prior suspension for fighting and disorderly conduct related to an incident outside of a school cafeteria insufficient, as a matter of law, to put school on notice that it was reasonably foreseeable that the student was likely to punch his roommate).

Indeed, in a case with a strikingly similar factual predicate, the Maryland Court of Appeals held that a party who alleges that another party knew or should have known about a third party's alleged propensity for violence, without more, is not a sufficient factual allegation from which a duty may arise. *See Pendleton v. State*, 921 A.2d 196, 221 (Md. Ct. App. 2007). In *Pendleton*, the claimant and his mother, being homeless, were placed in a temporary shelter by one of the state representatives. Thereafter, when the claimant was 10 years old, he was removed from his mother's custody and placed in foster care. State officials then placed the claimant with a licensed residential child care provider. He was assigned to share a room in the residential group home with a 16-year-old male. The claimant allegedly was sexually and physically abused, and battered by that male. *See id.* at 200.

The only allegation of fact the appellant made with regard to the knowledge the [State Defendants – delete State?] had of the situation of with which it was charged was:

> Upon information and belief, the State and its Foster Care Program officials as well as Defendants Barnett Carroll and Cecelia Carroll were aware of (or should have been aware of) the sexual tendencies, deviousness and history of sexual assaults of Wratchford, and taken care not to place [appellant] in danger of being sexually assaulted by him.

Id. (noting that Plaintiff did not allege that Wratchford had committed assaults prior to those alleged by the appellant or that the State had knowledge of any sexual tendencies Wratchford may have had or that he had a history of sexual assaults). The Maryland Court upheld the trial court's dismissal of the claimant's amended complaint, for failure to plead facts sufficient to establish a duty on the part of the State. *See id.* at 221.

In the case at bar, the Circuit Court relied on *Pittway Corp.* for the proposition that a defendant's conduct must be the legal cause of the injuries sustained. *Baker*, 358 F.3d at 483. Baker insists that the Circuit Court's application of *Pittway Corp.* is in error, but does not challenge the principles that the Circuit Court applied. Pet. at 14-15.

Pittway Corp. simply stands for the proposition that a plaintiff's injuries must be a reasonably foreseeable result of the defendant's conduct for the defendant to be held liable. *Pittway Corp.*, 973 A.2d at 787-791. *Pittway Corp.*, citing well-established Maryland law, reiterated that:

> In applying the test of foreseeability . . . it is well to keep in mind that it is simply intended to reflect current societal standards with respect to an acceptable nexus between the negligent act and the ensuing harm, and to avoid the attachment of liability where, in the language of Section 435(2) of the Restatement (Second) of Torts (1965), it appears "highly extraordinary" that the negligent conduct should have brought about the harm.

Pittway Corp., 973 A.2d at 788.

Applying these legal principles, the Circuit Court concluded that an alleged sexual assault occurring outside of business hours at a personal residence of an employee was not the foreseeable result of Booz Allen's decision to employ the employee. Baker offers no authority contrary to the Circuit Court's position.

In sum, the Circuit Court correctly applied Maryland law to Baker's claims. The undisputed material facts did not permit Baker's negligence claims to survive because he could not, and did not, prove each of the elements of a negligence claim under Maryland law.

II. Baker Failed to Present or Establish His Claims Under Kyrgyz Law.

The Circuit Court did not err in its analysis of the application of Kyrgyz law.

First, Baker sought the application of the very law – Maryland law – he now contests. A-10.

Second, even if Kyrgyz law *must* have been applied to the case at bar, the presentation of Kyrgyz law through the Declaration of Tatiana Ivashchenko accurately and sufficiently demonstrated that Baker's claims failed as a matter of Kyrgyz law. *See* App. at 13a-15a.

Third, Baker did not satisfy the procedural requirements under FED. R. CIV. P. 44.1 with respect to the presentation of foreign law. Indeed, the only party that identified Kyrgyz law as applying was Booz Allen, as evidenced by the District Court ruling from the bench. *See* App. at 13a.[4]

For the foregoing reasons, the Circuit Court did not err when it concluded that Baker failed to establish his negligence claims under Maryland law, as opposed to Kyrgyz law. The Circuit Court's decision was correct, and this Court should accordingly deny the Petition.

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[4] Booz Allen tendered a declaration made pursuant to 28 U.S.C. § 1746(B), by Tatiana Ivashchenko – a member of the Kyrgyz bar that was properly considered by the District Court. *See Bonstingl v. Maryland Bank, N.A.*, 662 F. Supp. 882, 884 (D. Md. 1987) (noting that courts may consider affidavits of foreign attorneys for analysis of issues affected by foreign law).

III. Baker Presents No Federal Issues For This Court To Review.

In addition to the reasons stated above, this Court should deny Baker's Petition because Baker does not present any compelling reasons for which this Court normally exercises its discretionary right to review.

First, the Circuit Court's decision does not conflict with the decision of another United States court of appeals. *See* SUP. CT. R. 10(a). The Circuit Court applied Maryland procedural and substantive law to determine whether Baker established a claim for common law negligence. Baker contends that this case conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Jones*, 583 F.3d 228. The issue in *Jones*, however, was whether tort claims arising from a sexual assault by an employee were subject to arbitration because the plaintiff's employment contract required all claims "related to her employment" to be arbitrated. *Jones*, 583 F.3d at 230.

The *Jones* case, contrary to Baker's contention, is not in conflict with the Circuit Court decision. The Court in *Jones* simply determined that tort claims fell outside the scope of an arbitration agreement and, therefore, the plaintiff could pursue her remedies in court. *Jones* has nothing to do with whether the conduct alleged constituted the torts claimed. *Jones* did not apply Kyrgyz or Maryland law. Indeed, the plaintiff in *Jones* was originally based in Texas, than in Iraq. Neither Maryland nor

Kyrgyz law is implicated in *Jones*. In short, *Jones* is wholly inapposite to this case.

Second, the Circuit Court's decision did not decide any federal question – let alone an important one – in a way that conflicts with a decision made by a state court of last resort. *See* SUP. CT. R. 10(a), (c). Baker demands that this Court review the Circuit Court's decision which applied Maryland procedural (*lex loci delicti*) and substantive (negligence) law. Ironically, Baker now requests that this Court review the Circuit Court's decision to apply Maryland law – a decision made at Baker's request. Baker never filed a Rule 44.1 notice of application of Kyrgyz law at the District Court level. Indeed, Baker requested the application of Maryland law at the Circuit Court level. In any event, as set forth above, Baker's claims fail under either Maryland law or Kyrgyz law. The Circuit Court's decision did not rely on or implicate the interpretation or application of any federal constitutional, statutory, regulatory provision, or of any rule of civil procedure. This Court has no reason to review Baker's case because it does not implicate any federal law.

Third, the Circuit Court's decision does not depart from the accepted and usual course of business in a way that involves this Court's supervisory power. *See* SUP. CT. R. 10(a). Baker contends that the Circuit Court "made public policy" through its decision. Instead, the Circuit Court simply applied Maryland common law to conclude that Baker could not establish that Booz Allen's alleged conduct could have proximately caused any

damage. Indeed, Baker does not even allege that the Circuit Court acted inappropriately.

Fourth, Baker's challenge to the decision is simply that the Circuit Court misapplied properly stated rules of law, which is not a proper subject of review. *See* S. Ct. R. 10. Baker's appeal on this point is essentially twofold. Baker challenges the Circuit Court's application of Maryland *lex loci delicti* doctrine, even though the Circuit Court adopted Baker's position that Maryland substantive (negligence) law applies. Baker then challenges the Circuit Court's application of Maryland common law of proximate causation. Baker does not challenge the interpretation or characterization of either the Maryland *lex loci delicti* rules or the proximate causation rules applied by the Circuit Court.

This Court will not ordinarily grant *certiorari* to review questions of state law decided by federal courts of appeal. *See Haring v. Prosise*, 462 U.S. 306, 314, n. 8 (1983) (standing alone, a challenge to a state-law determination by the court of appeals will rarely constitute an appropriate subject of this Court's review). This is so because lower federal courts are deemed, by this Court, to be more familiar with the laws of the states of their jurisdictions. *See Granberry v. Greer*, 481 U.S. 129, 136, n. 9 (1987). In essence, this is exactly the nature of review Baker seeks this Court to conduct.

In short, Baker presents no compelling reason or federal issue for this Court to review the Circuit Court's decision.

CONCLUSION

This case presents no federal issue for this Court to consider. Instead, Baker requests that this Court review the Circuit Court's decision to apply unchallenged Maryland procedural and substantive law to conclude that Baker did not establish a negligence claim against Booz Allen. There is no reason for this Court to review the Circuit Court's application of settled Maryland law. Accordingly, this Court should deny Baker's Petition for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MARYLAND

MARK BAKER,
Plaintiff,

vs Civil Action: RWT-06-0889

BOOZ ALLEN HAMILTON, INC.,
Defendant.

Wednesday, December 19, 2007
Greenbelt, Maryland

The above-entitled action came on for a Motions Hearing Proceeding before the HONORABLE ROGER W. TITUS, United States District Court Judge, in courtroom 2C AT 2:04 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE PROCEEDINGS AS RECORDED AND REQUESTED BY COUNSEL.

APPEARANCES:
On behalf of the Plaintiff:
DAVID L. WOODY, Esquire
KATHLEEN J. WOODY, Esquire

On behalf of the Defendant:
STEPHEN W. ROBINSON, Esquire
DAVID L. GREENSPAN, Esquire

Tracy Rae Dunlap, RPR, CRR
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* * *

relationship with that child who is being babysitted. The employer has no relationship with that invitee that comes on the premises.

THE COURT: What would happen if the gentleman in question had gotten into a cab outside of the Booz Allen offices and got into a dispute about a fare and punched the cab driver? Could the cab driver sue Booz Allen?

MR. WOODY: I don't know. That cab driver is a Kazakhstan citizen, number one, and I'm not here to argue whether he would have right or not. I only know we're talking about American citizens who were there in Kazakhstan where Kazakhstan law would not apply, but there was a duty for these particular individuals.

I'm not talking about respondeat superior, Your Honor. I'm talking about negligent retention. Negligent retention deals with notice given to employers. This was an employee who was the one who was responsible for giving the notice and who did give the notice in reference to an employee to whom a responsibility was owed and a special relationship existed.

THE COURT: Anything further?

MR. ROBINSON: No, sir, Your Honor.

THE COURT: Okay.

On January 9, 2006, the plaintiff, Mark Baker, filed an action in the Circuit Court for Montgomery County against the defendant, Booz Allen Hamilton, Inc. That complaint, which has since been amended, together with all other pleadings in that case, was removed to this court by the defendant, where it was received on April 6, 2006.

Shortly thereafter, Booz Allen filed an answer to the complaint, and the plaintiff filed a motion to remand the matter to the state court which was denied by the court on June 22, 2006.

In January of this year, counsel for the plaintiff, Henry Wile, entered his appearance, and on January 25th filed a motion for leave to file an amended complaint, which the court granted on March 9, 2007. The amended complaint is the applicable document that is now before the court.

In that amended complaint, Baker alleges that his mother was employed by Booz Allen, and in her capacity as an employee of Booz Allen was dispatched to Kyrgyzstan to perform services for the company. It is alleged then in about March of 1996, while she was in Kyrgyzstan performing her duties, the plaintiff, who was then a minor residing with his mother, was raped and sodomized by an employee of Booz Allen, and that he threatened the plaintiff not to tell his mother.

It is alleged that Booz Allen knew or in the exercise of reasonable care should have known that the gentleman in question had a serious emotional disorder who had previously requested that he be returned to the United States as a result of said emotional disorders.

It's also alleged that Booz Allen was negligent in a variety of ways enumerated in Paragraph 5 of the complaint, including failing to consider adequately the reports of employees that he was suffering from emotional disorders which were likely to result in his actions perpetrated against the minor plaintiff as described in the complaint; that Booz Allen failed to foresee that its employee's actions perpetrated against the minor plaintiff would be carried out; that it failed to warn or provide plaintiff's mother with notice of its employee's emotional disorder; that it failed to provide plaintiff with adequate security which could have prevented the acts perpetrated against him by its employee, and that it was negligent in further ways that would be shown at trial.

Then it's alleged that the plaintiff suffered serious and permanent injuries and cause to expend large amounts of money for ongoing medical care and treatment, sustained loss of earnings and loss of future earnings capacity, and has endured and will continue to endure great pain and suffering, both physical and mental; and then there is an addendum clause demanding judgment for $10 million.

The case has proceeded through discovery with a few bumps in the road with discovery

disputes, but the matter is now before the court on the defendant's motion for summary judgment which was filed by it on July 30 of this year.

The matter before the court is a summary judgment motion which is authorized if the pleadings, depositions, answers to interrogatory, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party's entitled to judgment as a matter of law.

I am required to and will view the evidence in the light most favorable to the nonmoving party, and I will -- and a material fact is one that might affect the outcome of the suit under governing law.

To avoid summary judgment, the nonmoving party may not rest upon mere allegation or denial of his pleading but must set forth specific facts showing that there is a genuine issue for trial.

The factual record of this case that's been developed before me has documented a number of undisputed facts. One fact that is heavily in dispute is whether or not the homosexual rape of the then minor plaintiff occurred at all. The defendant vigorously disputes that and indicates that this is someone who has previously reported about making -- reported rape allegations that it contends were false. So, it is a matter of vigorous dispute with Booz Allen that this ever took place.

Nevertheless, Booz Allen, as it must for purposes of a summary judgment motion, has

conceded that for purposes of the motion the court should assume that the homosexual rape of the then minor plaintiff took place, but it argues that on the basis of the uncontroverted facts that are not in material dispute that it is entitled to judgment as a matter of law, even if the rape occurred which, as I noted, it disputes does not dispute for purposes of the motion.

I've already reported that the complaint indicates that the plaintiff, when he was ten years old, went with his mother to Kazakhstan, and that his mother was responsible for supervising project staff and reported directly to two persons in the Virginia office of the defendant named Norman Kirsch and Sally Everett.

The employment of the plaintiff with the defendant apparently ended sometime in 1996. The employee at issue in this case is named Davenport, and he was hired by the defendant in April 1994 and is still employed by the defendant. At the time of the alleged homosexual rape, he worked on the same project as the plaintiff's mother and reported directly to her. It not controverted that at no time prior to the alleged rape was he ever disciplined or demoted.

Ms. Woody testified in deposition that she reported several incidents involving Mr. Davenport to Kirsch and Everett, and she did report on a car trip that had been taken by the plaintiff, his mother and Davenport between two towns in Kazakhstan and Kyrgyzstan sometime around New Year's Eve in 1995. Apparently, this trip was a lengthy trip -- something in the neighborhood of three hours, if I

recall correctly -- and that there was a driver and Mr. Davenport was in the front seat. Apparently, the plaintiff, who was a young child, was making noise that was not to the liking of Mr. Davenport, who apparently was tired, and it is alleged that he pointed his finger in the plaintiff's face and said in a threatening manner, "If I don't get my REM sleep, I'm going to explode, and the plaintiff's mother claims that she reported that incident to Booz Allen immediately.

It's also alleged that -- or there's information before me that appears not to be controverted that Mr. Davenport complained to the plaintiff's mother that he wanted to leave central Asia and go back to the United States.

She also alleges that she reported to the defendant that Davenport had told her -- told the plaintiff to be quiet at a party, and that he was going to get him.

Ms. Woody also alleges that she told Booz Allen that Davenport should be relieved of his duty and she wanted him out of there, and that he was a danger to her and her family.

She's also alleged that there were incidents involving Mr. Davenport throwing office supplies at the plaintiff, or at least that the plaintiff told her that; that she reported this behavior to officials of Booz Allen, and she makes allegations of other threatening conduct by Mr. Davenport. Specifically, she, Ms. Woody, was told Davenport had thrown things in the office, and also observed him wag his

finger at staff in close proximity, yell at staff, and threaten staff with firing.

Finally, she claims that Mr. Davenport also slapped two staff members.

In support of these allegations, the plaintiff also submits an affidavit of -- I'll spell it. K L Y U C H N I K O V -- let Tracy get that -- and I'll just say "Mr. K" -- purporting to corroborate Ms. Woody's claims of her reporting of incidents to her supervisors.

He reports that he overheard Ms. Woody tell Kirsch and Everett of her concern that Davenport was becoming erratic and more explosive and acting in a physically and emotionally abusive manner towards her staff.

He also reports hearing Woody pleading with her supervisors to send Davenport back to the United States before he seriously hurt her or plaintiff.

While the complaint, which I previously alluded to and paraphrased, specifically alleges that Booz Allen knew or should have known that Mr. Davenport was a person with a serious' emotional disorder, there is nothing in the record to indicate that in fact he had a serious emotional disorder. There is uncontroverted information about abusive behavior, but there is no documentation in this record indicating that there is a diagnosed, documented emotional disorder of any nature whatsoever -- or at least of any nature that was

communicated to Booz Allen, other than communication to Booz Allen of incidents of abuse to the staff, slapping somebody twice and otherwise acting in an emotional and obnoxious manner.

The plaintiff himself in his deposition, when asked to address the question of whether it was foreseeable that Davenport would do something, said that, "I suppose Booz Allen had no way of foreseeing that Davenport was going to perpetrate such a heinous crime against the child. There is no way they could have known." That's from the mouth of the plaintiff himself in his deposition.

Ms. Woody has conceded that she had no knowledge that Davenport ever sexually assaulted anyone, whether heterosexual or homosexual, prior to the incident, or he assaulted any child. There were two coworkers who testified that they could not recall any behavior that indicated Davenport had a sexual obsession or fascination with the plaintiff or that he would be violent or commit a sex crime or assault. I pressed counsel today at argument as to whether there was any information that any sexual assault had been committed on anyone or whether in connection with, for example, the slapping incident or incidents of that nature anyone had ever received medical attention, ever been prosecuted, ever made a claim, and the answer was no.

I have a number of miscellaneous motions before me that all relate to the summary judgment motion which is the principal motion before me. I'll briefly address them.

There were affidavits submitted by plaintiff in opposition to the motion for summary judgment by Leo Surla, Irina Zippman, and "Mr. K." For various reasons, the defendant argues that I should strike those affidavits in their entirety. I am not going to go through these affidavits line by line and parse them. I will, first of all, tell you that I'm well aware of the standard of what is proper to be considered in a summary judgment affidavit. If there's something that is not based on personal knowledge, I will not consider it; if there's something that is inadmissible hearsay, I will not consider it; and if there's something that's in violation of an order of this court, I won't consider I it.

With regard to the affidavits of Surla and Zippman, Judge Connelly of this court, after refereeing some earlier discovery disputes, entered an order of November 6 stating that the plaintiff must re-answer and/or supplement interrogatory answers and responses to requests for production of requests not later than January 15, 2007. Just to get the point across, he said, "This deadline is a hard cutoff date. Information not produced or provided by January 15 will no be admitted for purposes of this litigation."

It's suggested that I should not consider the affidavits of Surla and Zippman because it's in violation of Judge Connelly's order. I'm not certain how important to the overall resolution of this case those affidavits are, but I'm going to deny the motion to strike. While these persons were not identified until June, more than five months after the January deadline, I have to consider also that Judge

Connelly, thereafter, extended the discovery deadline to June 29. So, I'm simply not going to strike those affidavits.

With respect to the affidavit of "Mr. K." First of all, to the extent that the motion seeks to strike the entire affidavit, I'm going to deny it. I don't think that the affidavit should be stricken in its entirety. Clearly, this gentleman was identified -- perhaps not to the satisfaction of the defense -- in January of this year, but I don't believe that there's enough here to completely strike the affidavit.

Now, the affidavit of "Mr. K" has contents which perhaps are on a different footing than the question of striking the entire affidavit. First of all, the affidavit contains what the -- is contended is hearsay statements by "Mr. K" about conduct of Davenport and the reporting of that conduct. It is clear to me that the purpose of this affidavit is to place before me information from "Mr. K" that is not provided to me for the purpose of establishing the truth of the matters but, rather, to simply establish that there was communication of these facts to Booz Allen. Therefore, to that extent, in terms of notice to the defendant, I will deny the motion. The only place where I have pause for concern is in -- there's some information in here -- for example, Paragraph 14 is completely irrelevant to this case. It's talking about security issues generally and nothing do with Mr. Davenport. Paragraph 24 is simply him saying that Ms. Woody told him something and that, I don't find, would be appropriate to consider. As I said, in general, I'm going to consider the affidavit, and I'll

just close my eyes when I get to something that doesn't belong before me.

Now, with those preliminary observations about the discovery disputes and issues in this case, now let me go to the merits of the case. The first question before me is what law to apply. This is a federal court, sitting in diversity jurisdiction. First, the court will apply the choice of law rules of this state. Maryland follows the principle of lex loci delicti. When events giving rise to a tort action occur in more than one state, the law of the place where the last act occurred is defined as the place where the injury occurred.

In this case, there is no dispute that any injury that allegedly was suffered by the plaintiff was in Kyrgyzstan. Therefore, applying the choice of law rules of the state of Maryland, I should look to the laws of Kyrgyzstan, at least initially, and ascertain the law of that jurisdiction to the extent that I can.

Now, the defendant, when we get to the application of the laws of the potential sources of law in this case, argues that there is -- that the plaintiff must demonstrate that the -- that he was raped by Davenport, which they're conceding for purposes of this motion only, and otherwise vigorously dispute it, but must show that the defendant had some degree of knowledge or notice that the rape was reasonably foreseeable, and then it argues that under the laws of Kyrgyzstan, Maryland, or Virginia, the plaintiff cannot establish the existence of a duty or breach

thereof under the facts of this case as viewed in the light most favorable to the plaintiff.

Now, it's been -- I've had an affidavit offered to me from a attorney named Tatiana Ivashchenko -- I think I got that close to correct. It's I V A S H C H E N K O. She points out, after identifying herself as a member of the bar and that she has experience of ten years in the laws of that country, that this is a civil code or civil law jurisdiction, unlike the United States, where all but Louisiana are common law jurisdictions, and have a system based on case precedence, rather than on a civil code.

She indicates that a legal entity is responsible for its employee's actions or inactions if that employee has caused harm to third parties in the course of the performance of his or her employment obligation's but notes that even if an employee were to cause harm to a third party in the course of the performance by that employee of his or her employment obligations, an employer shall not be liable for its employee's actions or inactions, unless the predicate act, which must have resulted in criminal sanctions, were completed on the employer's order and control.

Now, the plaintiff objects to the timeliness of the submission of this affidavit under Rule 44.1 and argues that it is untimely. I do not agree. The defendant has clearly raised it in its motion; attached, it in an affidavit. If the plaintiff was unhappy with the content of the affidavit, the plaintiff could also have submitted an affidavit of

somebody submitting information to me on the laws of Kyrgyzstan.

Anybody applying Maryland law would know that it would not be a surprising turn of events if a defendant properly analyzing the law were to suggest to me that that's the law that should be applied. So I therefore reject any notion that the notice of reliance upon foreign law is untimely, and I will therefore look at the law of Kyrgyzstan to the extent that I can interpret it.

I will point out that if -- that a court is -- may, but I don't have any books back in my law library from Kyrgyzstan -- may conduct an independent research to determine foreign law. I have no duty to do so, and I have the right to insist that the proponent of the foreign law present evidence on the question. If insufficient information on the content of foreign law has been provided, I may presume that the foreign law is the same as the local law.

I have been advised by counsel at argument today that the Kyrgyzstan lawyer was asked to advise about the law of employer liability for torts that harm third persons and that this was the answer given and that there was no explication of an alternative basis of liability such as is recognized in some jurisdictions for negligent hiring, supervision or retention. It would appear that the Kyrgyzstan law has a relatively narrow scope of employer liability for actions such as the nature alleged in this case. I have no reason to dispute that, and it seems to me that the law of Kyrgyzstan would not permit

liability to be imposed upon Booz Allen under the circumstances of this case.

I will not, however, rest any decision on such a simply relying solely upon Kyrgyzstan law, and I will address the question of whether or not there is a possible basis for liability under either Maryland law or under Virginia law which clearly, at least on the basis of the affidavit supplied to the court, is more generous in imposing liability on an employer on grounds other than strict respondeat superior.

Before I do that, I do note an allegation or suggestion is made that Kyrgyzstan law would be offensive to Maryland public policy because it appears to negate employer liability under respondeat superior under the unique circumstances that I just mentioned a moment ago in terms of there needing to be a criminal sanction and that it must have been completed upon the employer's order and control. There's a suggestion made that that violates Maryland public policy. I have not been referred to any Maryland case that would reject that law as offensive to Maryland public policy. And while I recognize that Maryland does under some circumstances decline to apply foreign law's offensive, Maryland public policy -- merely because Maryland law is dissimilar to the law of another jurisdiction does not render the law -- the latter contrary to Maryland public policy, and I find nothing in Maryland public policy that would make Kyrgyzstan law offensive or sufficiently offensive to call for this court to reject it.

Now, if one were to apply Maryland law, I don't think that the plaintiff fairs any better. In order to maintain an action for negligent hiring and retention under Maryland law, the plaintiff must prove the existence of an employment relationship, which clearly is established; the employee's incompetence, the employer's actual or constructive knowledge of such incompetence, the employer's act or omission causing the plaintiff's injuries, and the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.

Maryland has long recognized an employer's duty to the public to use care in hiring and retaining employees. The parties have mentioned, as they should, some cases in the Maryland Court of Appeals that have addressed this tort action, assuming for the purposes of discussion that Maryland law would apply and that Kyrgyzstan law either doesn't apply or is somehow offensive to Maryland public policy.

In Henley, the Court of Appeals, the highest court, narrowed the concept of duty to embrace only those persons or classes of persons to whom harm of some type might reasonably have been foreseen as a result of the particular tortious conduct. The court of appeals in the Pendleton case, handed down this year, in evaluating that question of whether one party's entitled to protection of or is under an obligation of the other party involves consideration to have following factors: The foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered the injury; the closeness of the connection-between the defendant's conduct and the

injury suffered; the moral blame attached to the defendant's conduct; the policy preventing future harm; the extent of the burden to the defendant; and the consequences to the community of imposing a duty of exercising care with resulting liability for breach; and the availability, cost and prevalence of insurance for the risk involved.

In this case I have examined the record with care, with a view to giving all of the inferences in favor of the nonmoving party. I have not found anything in this record that would indicate that the defendant was aware of a severe or documented emotional disorder of Mr. Davenport.

I've received no information in this record that would support a conclusion that Booz Allen was on notice that this employee had a proclivity or a high risk of committing sexual attacks of any nature, much less violent attacks. All I do have is some incidents of obnoxious behavior -- two instances of slapping someone, and bitter complaints by the plaintiff's mother to her employer that this man should be sent home.

I conclude that under Maryland law, if it were to apply, the foreseeability of the harm to the plaintiff would be clearly called into serious question, and I think the fatal question by the rulings of the Court of Appeals of Maryland in the Henley and Pendleton cases.

The defendant has also brought to my attention some cases from other jurisdictions such as Florida, with the K.M. versus Publix Supermarkets,

Inc. case which involved a seven year-old plaintiff on whose behalf an action was brought against his mother's employer after she entrusted the child to a coworker at the coworker's home, and it was alleged in this case that the employer knew the coworker had been convicted of attempted sexual battery, and the court affirmed the trial court's finding that the employer did not have a duty to control an employee off duty not then acting for the employer's benefit and not on the employer's premises and not using the employer's equipment. While that case is not precisely on all fours, that is powerful precedent for the notion that under the circumstances of this case there is no liability.

The plaintiff points out that this was not simply a grocery store employee but somebody who was sent to a far distant country and couldn't have been there but for the authorization of the employer. I take that into account, but the bottom line is that this was an act that took place not in the employer's premises and certainly not authorized by the employer such that respondeat superior would apply, and a reasonable employer knowing the information that has been brought to my attention by the plaintiff and viewing that light in the -- that evidence in the light most favorable to the plaintiff, I cannot conclude that under the appropriate application of the summary judgment standard, that the plaintiff could prevail in this motion.

Another case that has addressed some of these issues is Rhaney, in which the court reasoned that its view of foreseeability is not nearly wide enough to include a possible result but deals more with

probability of that result, and I conclude, as did the court in the Rhaney case, that slapping two fellow employees is not sufficient to create a foreseeable risk of the probability of a sexual assault.

Therefore, I conclude that if I were to apply Maryland law, which I conclude I do not need to apply but alternatively will apply to the extent that my analysis of the Kyrgyzstan law issue is incorrect, I conclude that the plaintiff has failed to meet his burden of showing that the defendant knew or should have known that the defendant was potentially dangerous. "Dangerous" meaning a danger of committing a sexual or other violent assault.

Finally, to the extent that my analysis of Kyrgyzstan and Maryland law is incorrect, and to the extent that because of the base of employment being in Virginia and the hiring decision taking place in Virginia, the plaintiff does not fair any better. In fact, it fairs worse. Under Virginia law, liability for negligent hiring is predicated on the negligence of an employer in placing a person with known propensities or propensities which should have been discovered by a reasonable investigation in an employment position in which because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a risk -- a threat of injury to others.

Virginia does recognize a separate claim for negligent retention in which an employer may be liable where it knew or should have known the employee was dangerous and likely to harm others.

I've already concluded that that is not the case here and that Virginia law is simply not helpful to this case to the extent if I were to apply it.

The defendant has made some additional arguments that I will just address briefly, but I don't think I need to address these issues at all, in light of my conclusions on the absence of any basis for liability. But to the extent there is any liability, I conclude that the plaintiff is not entitled to some of the damages that he claims. He has made claims for medical expenses, but the medical expenses occurred before he was 18, which were not pursued by his parents, and which are now barred by limitations, and are not before the court and will not be before the court in any damage claim; and it is uncontroverted that since he achieved the age of majority, he has not had any medical expenses. So, I conclude that this claim would not be one in which medical damage recovery could occur.

The second question that's raised by the defense is that they cannot demonstrate a linkage between his present emotional problems and the incident in this case because of an intervening alleged rape that occurred in 2002 at Washington Adventist Hospital. I agree with the plaintiff on this, that this is a question that would not eliminate damages but would, rather, call for some sort of apportionment to the extent that the proof at trial would allow a finder of fact to apportion it. So, I would, to the extent that it's seeking to eliminate any damages because of the intervening incident -- I do not believe that the defendant is correct, but I

just make those observations because they are not relevant any longer because of my conclusion.

Therefore, I will enter an order for the reasons that I have just stated on the record which grants the defendant's motion for summary judgment which is paper 56 and denies the motion in opposition filed by the plaintiff which is document 79.

Thank you very much.

(Off the record at 3:50 p.m.)